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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/593,534	09/19/2006	John Hatrick-Smith	046149-8018	4914
12572	7590	10/05/2011	EXAMINER	
Foley & Lardner LLP 777 East Wisconsin Avenue Milwaukee, WI 53202-5306			BAKER, LORI LYNN	
			ART UNIT	PAPER NUMBER
			3751	
			MAIL DATE	DELIVERY MODE
			10/05/2011 PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary**Application No.**

10/593,534

Applicant(s)

HATRICK-SMITH, JOHN

Examiner

L. BAKER

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 May 2011.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on ____; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 5) ☒ Claim(s) 25, 28-42, 46, 47 and 49-55 is/are pending in the application.
- 5a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 6) ☐ Claim(s) ____ is/are allowed.
- 7) ☒ Claim(s) 25, 28-42, 46, 47 and 49-55 is/are rejected.
- 8) ☐ Claim(s) ____ is/are objected to.
- 9) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 10) ☒ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-889)
Paper No(s)/Mail Date ____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date ____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: ____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/9/11 has been entered.

Claim Objections

2. Claims 25 and 46 are objected to because of the following informalities: The recitation, "*along **said foot of the or each return panel**, with a gap between a bottom edge of the door and the front side of the shower base and a water drain gap **between the foot of the or each return panel and the shower base***", is unclear and is interpreted as a lacking antecedent basis. The examiner requests *clarity* for the term "**the or**". The examiner suggests potentially applicable language, --said foot of the return panel, or each return panel--. Alternatively, --said foot, or each return panel--. Appropriate correction is required.

Specification

3. The disclosure is objected to because of the following informalities: Paragraphs are not enumerated (see remarks, page 7, line 7).
Appropriate correction is required.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

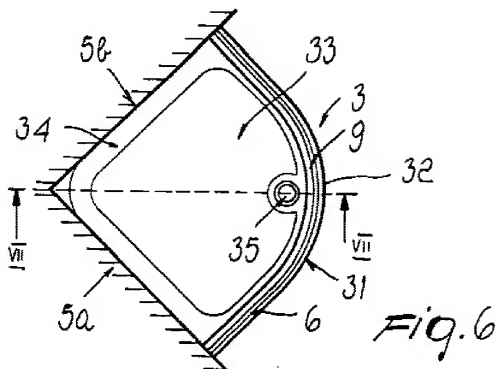
(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 25 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari in view of Payne. Montanari discloses a door 9 and a return panel 7a/b on one or both sides of the door, at a front side (see area proximate lead line 32 in figure below) of the enclosure 2 and, a shower base having a floor 33 which, as broadly claimed, falls (see col. 4, lines 12-14; lines 51-54 and figure 8 where 34 is apart of the floor 33 which falls or declines) towards the front side of the shower base, a waste outlet 35 at the front side of the shower base and which is associated with a drain channel 34 which extends around or across the shower base beneath and exterior to the door of the enclosure and the return panel or panels, and which is arranged to drain into the waste outlet. *As best understood by the examiner*, the shower base comprising an integral formation 32 or formations at a peripheral edge of the floor of the shower base adjacent the drain channel shaped to receive a foot of the return panel or panels (see figure 8 where the formation 32 is adjacent the drain channel 34, and *as broadly claimed*, the channel is shaped to receive a foot of the panel; Since applicant has recited functional language [i.e., shaped to

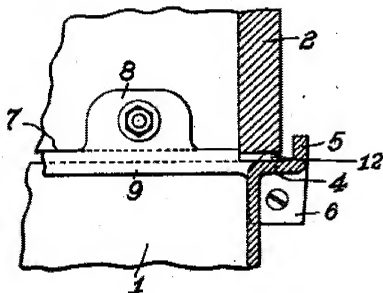
received] to describe the channel relative to the foot of the panel, the examiner contends that the prior art reference is capable of performing the function) and support from the shower base the return panel or panels along said foot of the or each return panel, with a gap between a bottom edge of the door and the front side of the shower base and a water drain gap ("suspended" door creates space/gap under door) between the foot of the or each return panel and the shower base through which water may flow beneath the door and the return panel(s) to the drain channel. If the interpretation of the formation is not satisfied by the Montanari reference, Applicant is directed to a secondary reference, Payne, an analogous art, teaches, as broadly claimed, a "shaped formation" 12. Payne teaches, according to claim 25 of the instant invention, "formation 12 or formations at a peripheral edge of the floor of the shower base 1 adjacent the drain channel shaped to *receive* a foot of the return panel 2" (see second drawing below; col. 2, lines 80-83) and a water drain gap between the foot of the panel and base to which water can flow (see col. 2, lines 84-85). The examiner interprets the formation 12 as receiving the panel 2, since it is placed upon the formation. The rejection stands. As to the remarks regarding a "non-sealed" gap, applicant is directed to the instant invention disclosure, page 5, line 26. The Applicant is reminded that the inventive concept of an application is taken into consideration during examination as well as the claimed subject matter. The claim would have been obvious because a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of

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ordinary skill and common sense. In response to applicant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, the prior art references of Montanari and Payne are analogous art, since they are in the field of applicant's endeavor (i.e., a shower enclosure); additionally, they are reasonably pertinent to the particular problem with which the applicant was concerned, and can be relied upon as a basis for rejection of the claimed invention.



Payne:

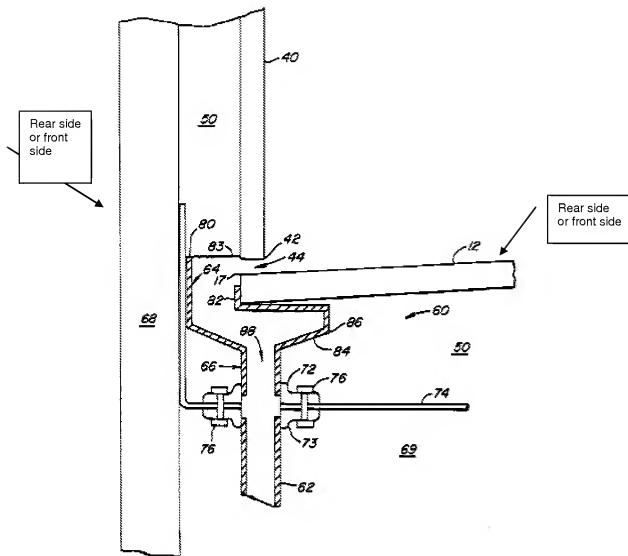


6. Claims 29 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claims 25 and 50 above and further in view of Zaccal et al. The rejection from the previous office action is incorporated herein. Applicant has not substantively argued this ground of rejection beyond noting claim dependency. As to claim 52, they include duplicate limitations relative to claim 29.

7. Claims 30-31 and 51, 53 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claims 25 and 50 above and further in view of Jurek et al '518. The rejection from the previous office action is incorporated herein. Montanari discloses a floor which falls (see arguments paragraph 5 above) from a *high point at a rear side* of the shower base to the *front side of the shower base*. Additionally, as previously cited, Jurek, an analogous art, discloses a sloping floor 12 (see figure 2, col. 3, lines 21-25). At the time the invention was made, it would have been an obvious matter of design choice to a person of ordinary skill in the art to incline a shower floor base because Applicant has not disclosed that an inclined floor from the front side to the rear side of the shower provides an advantage, is used for a particular purpose, or solves a stated problem. Nor has Applicant defined the exact location of the "front side" and "rear side". One of ordinary skill in the art, furthermore, would have expected Montanari's or Jurek's inclined floor, and applicant's invention, to perform equally well with either the incline from the front side to the back side OR back side to the front side because both inclined floor

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bases would perform the same function of draining water. Therefore, it would have been obvious to modify Montanari in view of Jurek to obtain the invention as specified in claim 31 because such a modification would have been considered a mere design consideration which fails to patentably distinguish over the prior art. See also MPEP 2144.04, subsection IV. A. – change in size or proportion. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., floor tilting away from the entrance) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).



8. Claims 25 is rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne in view of Jurek. Montanari and Payne disclose all of the limitations of the invention including a floor falling from front to back. Yet, if the interpretation of Montanari is not satisfied, thus Jurek teaches a floor that falls (see figure above and arguments for paragraph 8).

9. Claims 32-33 and 54-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claims 25 and 50 above and further in view of Gerloff. The rejection from the previous office action is incorporated herein. As to claims 32-33, Applicant has not substantively argued this ground of rejection beyond noting claim dependency. Claims 54 and 55 include duplicate limitations from claims 32-33.

10. Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claim 25 above and further in view of McAllister '571. The rejection from the previous office action is incorporated herein. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In response to applicant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, the

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prior art references are analogous, they are in the field of applicant's endeavor; additionally, they are reasonably pertinent to the particular problem with which the applicant was concerned, and can be relied upon as a basis for rejection of the claimed invention.

11. Claims 36, 39 and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari, Payne and Jurek as applied to claim 31 above. If the base of the Montanari shower is interpreted as not including a formation, attention is directed to the Payne reference which discloses an analogous shower which further includes a base 1 having a formation 12 (see arguments above in paragraph 5).

12. Claim 38 is rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari, Payne and Jurek as applied to claim 36 above and further in view of Zaccai. The rejection from the previous office action is incorporated herein. Applicant has not substantively argued this ground of rejection beyond noting claim dependency

13. Claims 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari, Payne and Jurek as applied to claim 36 above and further in view of Gerloff. The rejection from the previous office action is incorporated herein. Applicant has not substantively argued this ground of rejection beyond noting claim dependency.

14. Claim 42 is rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari, Payne and Jurek as applied to claim 36 above and further in view of McAllister. The rejection from the previous office action is incorporated herein. Applicant has not substantively argued this ground of rejection beyond noting claim dependency. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

15. Claims 46 and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne and Jurek as applied to claims 25 and 36 above and further in view of Torres (US Patent 7490371). The rejection from the previous office action is incorporated herein. In response to applicant's argument that Torres is used to improve control of moisture and trapped water, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

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16. Claims 47 and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claim 25 above and further in view of Lewis (PG PUB 20060182926). Although Montanari does not disclose cut-outs in the base, as claimed, attention is directed to Lewis. Thus, Lewis, an analogous prior art reference, teaches in figure 2, a cut-out 6, 13, 14, 4 in the shower base. Therefore, in consideration of Lewis, it would have been obvious to one of ordinary skill in the shower art to associate cut-outs within the base in order to drain the water. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

17. Claims 36 and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Montanari and Payne as applied to claim 25 above and further in view of Lewis. See the arguments for paragraphs 5, 11 and 16 above.

Conclusion

18. This is a RCE of applicant's earlier application. All claims are drawn to the same invention claimed in the earlier application and could have been finally

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rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE**

FINAL even though it is a first action in this case. See MPEP § 706.07(b).

Applicant is reminded of the extension of time policy as set forth in 37

CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to L BAKER whose telephone number is (571)272-4971. The examiner can normally be reached on M-F, 8am-5pm. For interview requests, please contact the examiner directly and submit PTO Form 413A. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/L BAKER/
Primary Examiner, Art Unit 3751

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"The authorization given on _____, to the USPTO to communicate with me via the Internet is hereby withdrawn. I understand that the withdrawal is effective when approved rather than when received."

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